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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 187; No. 565, Misc.

LEVER BROTHERS COMPANY, *Appellant,*

v.

UNITED STATES, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS AND TO AFFIRM

LEVER BROTHERS COMPANY, *Petitioner,*

v.

UNITED STATES, et al., *Respondents.*

ON MOTIONS FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 487; No. 565, Misc.

LEVER BROTHERS COMPANY, *Appellant*,

v.

UNITED STATES, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS AND TO AFFIRM

LEVER BROTHERS COMPANY, *Petitioner*,

v.

UNITED STATES, et al., *Respondents*.

ON MOTIONS FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

PETITIONER'S REPLY BRIEF

I. THIS COURT HAS JURISDICTION OVER THE APPEAL IN No. 487*

A. *The Necessity for Review of the Orders.*—The Government's motion to dismiss the appeal in No. 487 and its opposition to our alternative motion for leave to file a petition for common law writ of certiorari in No. 565, Misc., do not undertake to defend the merits of the orders entered in the Ohio District Court.[1] In view of our extensive discussion of the merits of those orders in our Jurisdictional Statement, we shall not repeat the argument that the orders of the Ohio Court are plainly erroneous and raise substantial and important questions in connection with the judicial administration of the antitrust laws and the Federal Rules of Civil Procedure. Unless on review those orders are reversed, the district court in New York will be deprived of data essential to informed adjudication of this important antitrust case, and Lever Brothers will have been denied information vital to its defense.

B. *The Orders Under Review Are Final Judgments.*—The only jurisdictional objection to the entertainment of this appeal by this Court pressed by the Government is its argument that the judgments of the Ohio District Court are lacking in finality. As such, the Government contends they cannot be reviewed

* This brief is submitted by Lever Brothers Company in opposition to a motion by the United States to dismiss the appeal in No. 487, and in opposition to a motion by the Procter & Gamble Company, et al. to dismiss or affirm. Lever Brothers also submits herewith its reply to the oppositions interposed to Lever Brothers' motion for leave to file a petition for a common law writ of certiorari in No. 565, Misc.

[1] The Government's motion, significantly, is captioned simply a motion to dismiss, and not one to affirm.

under Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29, which limits appellate review to "final" judgments. We submit that the orders involved are final, and hence this objection is utterly without merit.

1. In considering the finality issue, it is essential to bear in mind all of the special characteristics of the orders which Lever Brothers seeks to have reviewed:

(i) The orders were entered by a court other than the court in which the action on the merits is pending, i.e., the case involves so-called "foreign" discovery proceedings.

(ii) The orders involve a party to the action on the merits (Lever Brothers) and third persons who are not parties (Procter & Gamble, et al.).

(iii) The orders entered by the Ohio district court *denied* a discovery application; the court below *granted* a motion to quash and it *refused* to require answers to questions propounded at an oral deposition.

(iv) There has been a final disposition of the proceeding between Lever Brothers and Procter & Gamble in the Ohio district court. Lever Brothers can do nothing further in that court to secure the required information.

In view of the foregoing facts, the bulk of the cases cited by the Government are totally irrelevant to the resolution of the special jurisdictional question presented here. Thus, cases holding not final and unappealable ordinary orders granting or denying discovery, involving parties only, and entered by the

court in which the action will be tried on the merits, are completely beside the point.[2] The correctness of such orders can clearly be reviewed on appeal from the judgment eventually rendered by the court in the cause, and, accordingly, such orders are purely interlocutory. Further, cases involving orders by a foreign court *granting* discovery against a nonparty are inapposite; such orders are deemed nonappealable on the ground that there is no final order until the witness is found in contempt for refusal to comply with the discovery order.[3]

2. An entirely different situation is presented, however, by an order entered in a *foreign* discovery proceeding, involving a *nonparty*, *denying* discovery such as the orders under review herein. If the for-

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[2] For such beside-the-point cases, see *Cogen* v. *United States*, 278 U.S. 221 (1939); *United States* v. *Tinkoff*, 153 F. 2d 106 (7th Cir.), *cert. denied*, 329 U.S. 740 (1946), cited by the Government, Motion, p. 8. Also irrelevant are the cases dealing with interlocutory orders involving other than discovery matters, entered by the court in which the action is pending. See, e.g., *United States* v. *California Co-Operative Canneries*, 279 U.S. 553 (1929); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137 (1944), cited by the Government, Motion, p. 7.

DiBella v. *United States*, 369 U.S. 121 (1962), relied upon by the government, and *Koenig* v. *United States*, *ibid.*, involved orders granting or denying motions to suppress evidence in criminal cases, and are likewise inapposite. Moreover, unlike the present case, *DiBella* and *Koenig* involved only parties to the action on the merits.

[3] This principle is the basis of *Alexander* v. *United States*, 201 U.S. 117 (1906); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Robinson* v. *Bankers Life & Casualty Co.*, 226 F. 2d 834 (6th Cir. 1955); and *National Nut Co.* v. *Kelling Nut Co.*, 134 F. 2d 532 (7th Cir. 1943), cited by the Government, Motion, p. 8, and by Procter & Gamble, Motion, pp. 6-7. On the other hand, it is held that when a non-party witness declines to answer and is held in contempt, a final judgment is presented, and an appeal lies. *Nelson* v. *United States*, 201 U.S. 92 (1906). The present case involves an order *granting* a motion to quash a subpoena; in a case of this kind, no further proceedings can ensue, as they may in the case of a denial of such a motion.

eign court's order denying discovery is deemed to be non-appealable, the party adversely affected will be entirely denied appellate review of a highly prejudicial order. In terms of the present case, the erroneous curtailment of Lever Brothers' discovery rights by the District Court for the Southern District of Ohio if unappealable now, will not be grounds for reversing a judgment later entered by the District Court for the Southern District of New York; and this without regard to the prejudice suffered by Lever Brothers in the trial of the action. No case has been cited which holds that an error of this nature by one district court can be imputed to the judgment of another district court so as to render the latter court's judgment erroneous and subject to reversal on appeal. Indeed, there is learned authority that it cannot be so imputed.[4]

The more carefully considered opinion in the Courts of Appeals dealing with the appealability of a foreign discovery order comparable to the orders in the present case is *Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421 (1st Cir. 1961).[5] There it was held that an order quashing a subpoena *duces tecum*, addressed to a third party, entered by a district court other than the district court in which the action on

[4] *Horizons Titanium Corp. v. Norton Co.*, 290 F. 2d 421, 422-423 (1st Cir. 1961).

[5] Contrary to *Horizons Titanium* is the earlier case of *Palmer v. Fisher*, 228 F. 2d 603 (7th Cir. 1956), *cert. denied*, 351 U.S. 965 (1956). The *Palmer* decision was shown by the Court of Appeals in *Horizons Titanium* to rest upon faulty analysis and of course was not followed (290 F. 2d at 422-423). The *Horizons Titanium* case and the *Palmer* case are the only two cases found which discuss the question of whether an order denying foreign discovery is a final judgment for purposes of appeal under appeal statutes such as §1291 of the Judicial Code, or §2 of the Expediting Act.

the merits is pending, is a "final" appealable judgment under the provisions of 28 U.S.C. 1291, the appeal statute relating to ordinary civil litigation, which, like the Expediting Act, demands a "final" judgment. In *Horizons Titanium*, a plaintiff in a proceeding pending in the District Court for the District of Columbia sought to subpoena records from a third party in Massachusetts. The District Court for Massachusetts granted a motion to quash the subpoena. The Court of Appeals for the First Circuit denied a motion to dismiss the appeal and held the order appealable. The Court pointed out that (290 F.2d at 423):

> "The appealability of orders cannot be decided by rote. It is not the fact that the order below dealt with a motion to quash a subpoena duces tecum that is controlling, or, perhaps, not even that the motion was granted. Nor does it make any difference that the court's action was not a final judgment in the usual sense. What is critical is whether the party unsuccessfully seeking the subpoena has any other means of obtaining review. . . . *Here the order of the district court made a final disposition of the only proceedings in its district growing out of a particular controversy, and the only proceeding pending between these particular parties anywhere.* It cannot be said to lack finality either because it was ancillary to some other proceeding in another district, or because before some other district judge, or on some other set of facts, a different decision might have been made. The motion to dismiss for lack of jurisdiction must be denied." (Emphasis supplied).

The government attempts to distinguish *Horizons Titanium* on the theory that, under the Expediting Act, Lever Brothers can secure review in this Court

of the Ohio court's ruling in an appeal from a judgment on the merits by the New York court (Gov't Motion, p. 10). It suffices to say that no case decided under the Expediting Act holds that a foreign court's order denying discovery is subject to review on appeal from a judgment on the merits by the district court in which the action is tried. Indeed, the Government's reliance on such a novel premise to distinguish the leading precedent underscores the necessity for review here.

Procter & Gamble (though, significantly, not the Government) argues that "we believe that the rulings of the Ohio District Court would be merged in the final judgment in the New York case and, therefore, reviewable [sic] on appeal from that judgment." (Procter Motion, p. 8).[2] Since Procter will not be a party to the judgment of the New York Court, it apparently feels a certain freedom to make this concession which the Government does not.

In any event, there is no basis for Procter's belief. *Parr v. United States*, 351 U.S. 513 (1956), upon which Procter relies, is certainly not authority for the point. In *Parr*, the Government obtained an indictment in one district; on defendant's motion, the case was transferred to another division in the same district. Thereafter, the Government obtained a new indictment in a second district and dismissed the first indictment. The defendant sought review of this dismissal on grounds that the Federal Rules of Criminal Procedure prohibited his prosecution in the second district. This Court held that the defendant's contention would be available to him on appeal from a judgment of conviction by the court in the second district, and

therefore, an appeal from the first dismissal would not lie. In other words, the defendant's contention in *Parr* was held to be one, which, if correct, would totally invalidate the proceedings in the second district and alone render them prone to reversal on appeal. It was in essence a jurisdictional objection. But there is no authority that an erroneous ruling on a foreign discovery motion, such as the orders presently in issue, infects the trial on the merits with such error. Procter's contention, then, is a sheer begging of the question here presented.

3. Viewed from another perspective, Lever Brothers is entitled to immediate review of the Ohio District Court's orders under the "offshoot rule" of *Forgay v. Conrad*, 47 U.S. 201 (1848), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950). Orders such as those entered by the district court are deemed immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action [on the merits], too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546.

There is no further action which Lever Brothers can take in the Ohio district court to secure the data.[6]

[6] Procter & Gamble does make some suggestion that Lever Brothers has alternate sources of proof. (Motion, pp. 9-10). The record is absolutely clear that none of them relates to the vital information in question here. What Lever Brothers is seeking are figures for advertising and promotional expenditures, research expenditures, and profit, by brand, for the Procter detergent brands iden-

The proceeding in the Cincinnati court is complete in itself. The present controversy "is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Radio Station WOW v. Johnson*, 326 U.S. 120 at 126 (1945).

4. The government apparently recognizes that the discovery question must be raised in the district court in New York before that court's judgment as to that issue could be cited as erroneous on appeal (Motion to Dismiss, pp. 8-9). The Government suggests two methods by which it claims Lever Brothers may be able to obtain the information through use of the New York court's processes. As a matter of law, the argument is irrelevant with respect to finality. To quote Judge Ahrlich in *Horizons Titanium Corp., supra* (290 F.2d at 423):

"We can hardly think that an order of a district

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ruled by the Government as within the relevant lines of commerce. This is what the subpoena *duces tecum* quashed by the court below called for. Procter's counsel instructed all his witnesses not to give, by way of oral answer, any of the information in question. Trans. RS Runnels Dep. pp. 14-15, July 19, 1962. The court below denied a Lever motion to compel those answers. Procter had advised the court below that the "information is not available from any source outside the company" and that it was "distributed within the company to only a very few persons in the management." (RS Runnels Affidavit, Par. 5, May 15, 1962). Indeed, the burden of Procter's objection to Lever's motion for discovery was that the information called for involved "trade secrets."

The remarks of Procter's attorney quoted (Procter Motion, pp. 9-10) simply mean that Lever may be able to get extraneous information other than that which has an obvious and vital bearing on its case and which is sought here. It is no answer to a request for information "A" to say that information "Z" will be given instead. Nor is it an answer to say that information "X" and "Y" have previously been given to the Government. (See Procter Motion, p. 9; Gov't Motion, p. 1).

In any event, the Procter contention is unrelated to the question of appealability.

> court quashing a subpoena lacks finality simply because the movant remains free to start all over again . . . Assuming . . . that a second application would not be precluded by principles of res judicata . . . it would be a singular rule that a decision on certain facts and circumstances lacks the finality necessary for an appeal simply because appellant could start over again by alleging other facts and circumstances which might produce a different result."

But in any event, as we discuss below, neither of the alternative courses suggested by the government is an effective means of obtaining the required information from Procter & Gamble.

(1) The government suggests that under the special statute (15 U.S.C. 23) which makes *trial* (though not *discovery*) subpoenas running throughout the country available to the parties in a governing civil antitrust suit at the discretion of the judge, Lever Brothers might obtain a subpoena *duces tecum* from the New York District Court compelling attendance at the trial of the Procter & Gamble executives in Ohio here involved. As a substitute for discovery, the suggestion is a fantastic one. If the government is at all serious in its suggestion, it may be that a new way has been found to deal with discovery problems in the so-called "big case"—eliminate discovery altogether and proceed at once from pleadings to trial.

The right to pre-trial discovery is entirely different from the right to call witnesses at trial. Discovery is a means of preparing for trial.[7] In discovery pro-

[7] Cf. the Antitrust Civil Process Act, 76 Stat. 548, passed September 19, 1962 in response to the disapproval voiced by the Judicial Conference and others to the bringing of an antitrust

ceedings, "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b). In short, the scope of pretrial discovery is much more comprehensive than the right to subpoena trial witnesses under 15 U.S.C. 23. Cf. *United States v. E. I. DuPont De Nemours*, 14 F.R.D. 341 (N.D. Ill. 1953); *United States v. Watchmakers of Switzerland Information Center, Inc.*, 27 F.R.D. 513 (S.D. N.Y. 1961).

The government's suggestion is totally unrealistic. The data involved are primarily statistical in nature and must be analyzed by accountants and other specialists. To defer discovery until trial would result in disruption of the trial and seriously handicap both the court and Lever Brothers' efforts to present the data.

(ii) Alternatively, the government suggests that Lever Brothers might obtain the required data by taking depositions upon written interrogatories under little-used Rule 31.[8] (Gov't Motion, p. 9). It is not clear from the government's motion whether it con-

suit by the United States "*without adequate factual preparation.*" H.R. Rep. No. 1286, 87th Cong. 2d Sess., 4-5 (1962). Significantly, Section 5(d) of the Act recognizes that court orders entered in the course of the newly permitted discovery proceedings could be final and appealable.

[8] The annotations to Rule 31 in *United States Code Annotated* indicate the paucity of rulings under that rule, and, inferentially, the disuse of that rule by the bar. Our objection to the Rule 31 procedure suggested by the Government as an alternative to the discovery denied below is based, however, not simply upon the cumbersome nature of Rule 31, particularly when used with a hostile deponent (See 4 Moore, *Federal Practice*, ¶31.02 (2d ed. 1950)), but upon the fact that there is no support for the Government's suggestion that the information in question here could be secured by Rule 31 proceedings.

templates that Lever Brothers should address written interrogatories to Procter executives in Cincinnati or to some subordinate Procter employee in New York. The government assumes that in either event Procter & Gamble would necessarily have to petition the trial court in New York for relief. The government's argument will not survive scrutiny.

The required data are controlled, according to Procter & Gamble, by "a very few persons in the management" at Procter's main offices in Cincinnati.[9] Even if some subordinate Procter employee in New York could be brought within the process of the New York court he would, in all probability, simply attend the place noticed for the taking of the deposition, state that the records were not in his control, and express his unfeigned ignorance when the interrogatories were read to him for his answers. The government cites no precedent for the notion that written interrogatories under Rule 31 may be addressed to a corporate employee, who is not a party, which require him to assemble corporate statistics in the control of corporate executives located in another district, prepare himself for examination with them, and produce them at the deposition. Unlike written interrogatories to a *party* under Rule 33, Fed. R. Civ. P., a deposition upon written interrogatories addressed to a non-party witness under Rule 31 calls only for the information personally known to the witness.[10] The

[9] R. S. Rinnells Affidavit, Par. 5, *In the Matter of United States v. Lever Brothers Co. and Monsanto Chemical Co.*, Civil No. 5054, S.D. O., May 15, 1962.

[10] The Government apparently is confusing the Rule 31 deposition procedure with the procedure established under Rule 33 for the service of interrogatories *upon a party*. There is no provision in Rule 31 corresponding to that of Rule 33, which provides

suggestion that Lever Brothers invoke the subpoena powers of the New York court is, therefore, not a helpful one.

The alternative proposed solution—written interrogatories served upon a Procter executive in Cincinnati—would be equally futile. If the interrogatories were accompanied by a subpoena, which would have to be issued by the Cincinnati court, Procter & Gamble would, of course, move to quash in the Ohio District Court. Presumably, that Court would make the same rulings it has twice made in the present case, i.e., it would quash the subpoena. The rulings of the Ohio court in the present case were not put upon any ground that would yield a different result if Rule 31 were employed. It follows, that the government's suggestion would lead full circle to precisely the present controversy.[11]

that a corporate officer answering interrogatories "shall furnish such information as is available *to the party*."

As Professor Moore points out, Rule 31 is simply a means of taking a witness' deposition, like the rule for oral depositions, Rule 30. See 4 Moore, *Federal Practice*, ¶31.02 (2d ed. 1950). This is a totally different matter from the Rule 33 procedure which searches the entire information available to a party, corporate or otherwise. Rule 33 is, of course, unavailable against Procter, inasmuch as Procter is not a party to the New York antitrust action.

[11] The Government points to its use of Rule 31 to obtain discovery from Procter of material useful to it in the preparation of its case. (Motion, p. 9). We trust by this reference that the Government does not mean to imply that it has made any use of Rule 31 in this case with respect to Procter that would have involved the coercive power of the New York court. In fact, the Government's Rule 31 notice was one to take the deposition of Procter's corporate secretary, whose address is in Cincinnati; it provided for the taking of the deposition in Cincinnati. Any coercive process, such as a subpoena necessary to enforce the deponent's attendance at the deposition would have to have been supplied by the Ohio District Court. In other words, except for the distinction in technique between oral and written

In sum, there are no suitable alternatives. The orders of the Ohio court are clearly final under the principles of *Horizons Titanium, supra*, and are subject to immediate appeal.[12]

C. The Appeal Properly Lies to This Court. Simultaneously with the appeal to this Court, Lever Brothers has taken an appeal to the Court of Appeals for the Sixth Circuit. *United States v. Lever Brothers Co.*, No. 15,766. On November 2, 1962, the Circuit Court entered an order deferring consideration of the jurisdictional questions raised in that appeal until this Court passed on Lever Brothers' appeal and motion for leave to file a petition for certiorari.

deposition, the Government's discovery device utilized in this case with respect to Procter was the same as Lever Brothers'. The only practical difference was that Procter opposed Lever Brothers' discovery in the Ohio court, whereas the Government and Procter reached a separate private settlement as to the Government's discovery from Procter.

The Government discovery from Procter was finally obtained under stipulation between the Government and Procter to which Lever Brothers was not a party. Under the stipulation, the Government agreed to withdraw its interrogatories in exchange for a voluntary disclosure of only part of the information requested of Procter.

[12] It is significant that Judge Peck was of the opinion that the rulings he entered were appealable. Counsel for Lever Brothers informed him: "Lever Brothers of course will appeal if the ruling is adverse to it. We just must have this information." Judge Peck responded as follows:

> The Court . . . I am perfectly frank to say that it was the knowledge that it would be passed upon before any disposition by the Court of Appeals that had some leverage on the decision that was reached here . . .

On being informed that the appeal would be taken to this Court Judge Peck broadened his reference from "Court of Appeals" to "reviewing court." Transcript of Proceedings, pp. 14-15, *In the Matter of United States of America v. Lever Brothers Co. and Monsanto Chemical Co.*, Civil No. 5058, S.D. Ohio, July 24, 1962.

Lever Brothers perfected appeals to both courts because, while the orders of the Ohio Court are unquestionably final, there was some question as to whether certain language in the Expediting Act permitted an appeal to be taken to this Court, even from such a final judgment.[13] In order fully to safeguard its appellate rights, Lever Brothers following approved procedure filed an appeal to this Court, under 15 U.S.C. 23, and to the Sixth Circuit under 28 U.S.C. 1291. *See Columbia Gas & Electric Corp. v. American Fuel & Gas Co.*, 322 U.S. 379, 381 (1944).

The Government, in the Court of Appeals, contended that the orders in question were subject to the Expediting Act (*Mem. in Support of Motion to Dismiss Appeal*, pp. 4-5 No. 15140, 6th Cir. 1962), and in this Court it does not press any objection to this Court's jurisdiction by reason of the Expediting Act, apart from the requirement of finality common both to the Expediting Act and to 28 U.S.C. 1291.

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[13] The question, as a technical matter, is whether the language of the Expediting Act: "In every civil action brought in any district court of the United States under any of said acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court," with its reference to "*the* district court", prevents an appeal to this court from the Ohio District Court. We suggest that since foreign discovery proceedings are closely related to the original action on the merits, it can be said that they are proceedings in which the United States is a complainant, and the order of that district court is an order of "*the* district court . . . in a civil action . . . wherein the United States is complainant," within the meaning of the Expediting Act. Clearly this would be the case where the United States was the party seeking foreign discovery against a nonparty; the United States there would be complainant in the trial court and in the foreign district court. The result should not be different where the defendant is seeking discovery and the United States affects a position of neutrality.

We submit that minor verbal problems in the wording of the Expediting Act do not militate against this court's jurisdiction over the present final orders of the Ohio District Court, and that the appeal from these final orders properly lies here. This Court is obviously the preferable forum. The Courts of Appeals have no experience in civil antitrust cases brought by the government and their unique discovery problems.[14] In the ordinary government civil antitrust case, where all discovery motions are passed on by the court which adjudicates the merits, the discovery orders are reviewed by this Court on appeal from the final judgment on the merits. Accordingly, it would be more logical not to carve out the single exception of foreign discovery proceedings for review by the Courts of Appeal.[15] Finally, as discussed below, enforcement of a policy of abstention by the foreign court in favor of action by the judge to whom the case is assigned for trial on the merits, would minimize, if it did not altogether eliminate, any burden upon this Court.

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[14] The Government's civil antitrust case is the classic example of the so-called "big case," as discussed in many seminars, including those reported at 23 F.R.D. 319 (1958); 21 F.R.D. 395 (1957); and 13 F.R.D. 41 (1952). Moreover, since review of discovery orders is intertwined with questions of substantive antitrust law, the suitability of this Court, the reviewing Court for Government civil antitrust litigation on the merits, as a forum for the review of such orders, is apparent.

[15] While the Courts of Appeals review Government criminal antitrust cases on appeal after conviction, the criminal rules do not provide for the extensive discovery provided for by the civil rules. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1180 (1960). Moreover, Section 7 of the Clayton Act, involved here, is not a criminal statute.

II. ALTERNATIVELY, A COMMON LAW WRIT OF CERTIORARI SHOULD ISSUE IN NO. 565, MISC.

A. We have filed, alternatively to the appeal in No. 487, a motion for leave to file a petition for a common law writ of certiorari under the All-Writs Act, 28 U.S.C. 1651 (No. 565, Misc.). This Court has exclusive jurisdiction under the expediting Act to review final judgments in government civil antitrust cases. But should this Court be of the opinion that the orders in question are not final, and if the error in the ruling made by the Ohio District Court cannot be attributed to the final judgment of the New York District Court, the ultimate review authority of this Court will be lost; the final decision on an important question of antitrust law will have been made by the district court in Ohio. Under these circumstances, there will be need to protect the ultimate review power of this Court, and the grant of a prerogative writ by this Court would be appropriate. *See State of Maryland v. Soper*, 270 U.S. 9, 30 (1926); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945). The rulings by the Ohio District Court are so egregiously wrong, as we pointed out in our Jurisdictional Statement, and so inconsistent with the principles regarding the scope of proof accepted in antitrust cases under Section 7 of the Clayton Act, as to deny the trial court in New York, and the defendant, of material essential to the disposition of the case. (See our Motion for Leave to File Petition, pp. 8-9). Accordingly, this Court's power to issue a prerogative writ to protect its appellate jurisdiction should be utilized here.

B. Moreover, this case presents grave issues of proper judicial administration of the government anti-

trust "big case," of a nature closely analogous to those which have moved this Court to issue prerogative writs in antitrust litigation in the past. *See Far East Conference v. United States*, 342 U.S. 570 (1952); *United States Alkali Export Ass'n v. United States*, *supra*.

The trial and pre-trial proceedings in this complex antitrust case were assigned to a single judge in the New York District Court on the Government's own motion that this is a "major antitrust action . . . a long and complicated case." (Mem. in Support of Gov't Motion for Assignment of Judge, Civil No. 135-219, S.D.N.Y., Feb. 5, 1960). There have been a number of pre-trial conferences during the four years in which the case has been pending. The New York court has received and ruled on a large number of motions including discovery proceedings involving Procter & Gamble. *See United States v. Lever Brothers Company and Monsanto Chemical Co.*, 193 F. Supp. 254 (S.D.N.Y. 1961). To date, the Government alone has designated 104 separate trial witnesses, including various economic experts, and approximately 1,900 documents comprising from 15,000 to 20,000 pages. Under these compelling circumstances Lever Brothers moved the Ohio District Court to transfer Procter's objections to the discovery requests to the District Court in New York, where they would be covered by the single judge assignment, and could be passed upon by the judge who was familiar with the issues.

Procter & Gamble concedes that it "could have sought relief in the New York Court under Rule 30." (Brief of the Procter & Gamble Co., et al. In Opposi-

tion, p. 6).[16] While as a technical matter the Ohio Court had jurisdiction to pass on Procter's application,[17] in view of the circumstances of this protracted case sound judicial administration dictated that the Ohio court transfer the cause to the District Court in New York. Cf. *United States* v. *Kliphold*, 230 F.2d 494, 497-98 (2nd Cir. 1956); *United States* v. *Lester*, 21 F.R.D. 30, 31-32 (S.D. N.Y. 1957). Every requisite for a change of venue was present (see 28 U.S.C. 1404(a); *Hoffman* v. *Blaski*, 363 U.S. 335 (1960)), yet the Ohio court refused to transfer the cause without Procter & Gamble's consent.[18] The government does

[16] Relief equivalent to an order quashing the subpoena *duces tecum* could have been obtained by a protective order under Rule 30(b) from "the court in which the action is pending," i.e., the New York Court, to the effect that "certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters," or that "the deposition shall not be taken." It should be noted that Rule 45(d)(2), relating to subpoenas *duces tecum*, refers both to the motion to quash procedure established by Rule 45(d), and to the motion for protective order procedure available in the court in which the action is pending, provided by Rule 30(b).

[17] We do not, as Procter seems to believe, contest the jurisdiction of the Ohio Court to pass on Procter's motion (see Procter Brief in Opposition, p. 6). Our contention is that it was an abuse of discretion to have exercised that jurisdiction here.

[18] The District Court Judge in Ohio, (Peck, J.) indicated that he was well aware of the serious conflict created by a foreign judge ruling on a single discovery matter in the midst of a complicated case which has been proceeding for several years before one judge in another district court in another circuit. After ruling on all the motions presented and denying Lever Brothers' discovery application Judge Peck stated:

> "Let me say this, Mr. Krash, long after the fact. I of course agreed originally that it would be desirable to have this matter heard by Judge Dawson for the reasons that were explored at the time of the hearing and that it was not felt that this deponent could be required to go there. I afterwards had the thought that the entire thing might have been solved had Judge Dawson been designated to sit as a judge in this District, which could have been done with

but deny[19] the power of the Ohio District Court to transfer the case.[20] See *Equitable Trust Co. v. Schaebel*, 40 F. Supp. 112, 114 (E.D. Pa. 1941), aff'd, 117 F.2d 738 (3d Cir. 1941).

Had the Ohio Court refrained from passing on these questions itself, and transferred the matter to the New York Court for disposition, the integrity of the single-judge assignment would have been preserved,[21] and the jurisdictional issue now presented would have been avoided. Moreover, this procedure would have fostered the policy of expeditious enforcement of the antitrust laws.

In the context of this complicated antitrust case in which a single-judge assignment had been made, the Ohio Court's action in passing on the matter presented

the cooperation of the Chief Judges in the Courts of Appeals." Transcript of Proceedings, p. 19, *In the Matter of United States of America v. Lever Brothers Co. and Monsanto Chemical Co.*, Civil No. 7054, S.D. Ohio, July 24, 1962.

[19] See Jurisdictional Statement, p. 18. In the Ohio District Court, the Government expressed uncertainty as to the existence of the power, but did not deny it, and stated that it would not oppose transfer of the matter to the New York District Court. See letter from Assistant Attorney General Lee Loevinger, Esq. to Hon. John Peck, May 23, 1962, quoted in Jurisdictional Statement, p. 18.

[20] In addition to the general transfer power, under 28 U.S.C. § 1404 (a), which we think clearly applicable to the present situation, and the general power of the courts to order a person within their jurisdiction to appear in litigation elsewhere, evidenced by the *Schaebel* case, an obvious procedural device was available to the Ohio Court. It could have denied the motion to quash without reaching the merits, and without prejudice to the submission to the New York Court of a motion to vacate the notice of deposition or for a protective order under Rule 30(b).

[21] See the authorities on the single-judge assignment system set forth in our Jurisdictional Statement, pp. 17-18.

constituted an abuse of discretion. It is administratively intolerable that the conduct and outcome of a major antitrust case, already in progress for four years, should hinge on the single determination of a judge sitting in the district where vital documents happen to be controlled. The apportionment of responsibility among the district courts in different circuits, like the apportionment of responsibility between courts and administrative agencies, is uniquely within the province of this Court and is rightfully performed in appropriate cases by the issuance of its prerogative writs. *Far East Conference* v. *United States*, 342 U.S. 570 (1952); and *United States Alkali Export Assn., Inc.* v. *United States*, 325 U.S. 196 (1945). In furtherance of its supervisory control over the district courts, this Court should issue a writ of certiorari and grant a plenary review. *See La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957); *Atlas* v. *Mace*, 265 F.2d 312 (7th Cir. 1959), *cert. denied*, 362 U.S. 941 (1960).

CONCLUSION

For the reasons stated, probable jurisdiction should be noted in No. 187. Alternatively, the petition for leave to file a petition for writ of certiorari in No. 303, Misc. and the petition should be granted. Should the Court desire further argument on the jurisdictional question, we respectfully suggest that an order be entered postponing resolution of the jurisdictional question until argument on the merits in No. 187, and that argument on the motion for leave to file the

petition for writ of certiorari in No. 565, Misc., and the merits thereof, be had at the same time.

Respectfully submitted,

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